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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 347

MAX JABEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the district court (R. 38–44, 47–49) are reported at 225 F. Supp. 47 and 226 F. Supp. 757. The opinion of the court of appeals (R. 55–62) is reported at 333 F. 2d 535.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 1964 (R. 63), and a petition for rehearing was denied on July 9, 1964 (R. 64). The petition for a writ of certiorari was filed on August 3, 1964, and was granted on October 19, 1964 (R. 64). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the complaint filed by a special agent of the Internal Revenue Service charging petitioner with attempted evasion of income taxes in violation of Section 7201 of the Internal Revenue Code was sufficient to extend the statute of limitations on the prosecution of such offenses.

STATUTE AND RULES INVOLVED

Section 6531 of the Internal Revenue Code of 1954 provides in pertinent part:

> SEC. 6531. PERIODS OF LIMITATION ON CRIMINAL PROSECUTIONS.
>
> No person shall be prosecuted, tried, or punished for any of the various offenses arising under the internal revenue laws unless the indictment is found or the information instituted within 3 years next after the commission of the offense, except that the period of limitation shall be 6 years—
>
> * * * * * *
>
> (2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof;
>
> * * * * * *
>
> * * * Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the date which is 9 months after the date of the making of the complaint before the commissioner of the United States. * * *

Rule 3 of the Federal Rules of Criminal Procedure provides:

> Rule 3. THE COMPLAINT.
>
> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4(a) of the Federal Rules of Criminal Procedure provides:

> Rule 4. WARRANT OR SUMMONS UPON COMPLAINT.
>
> (a) ISSUANCE. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

STATEMENT

On April 16, 1957, petitioner filed his 1956 income tax return with the District Director of Internal Revenue at Kansas City, Missouri, and declared a tax liability of $6,017.32 (R. 38). On April 15, 1963, the following sworn complaint was filed before the United States Commissioner by David A. Thompson, a special agent of the Internal Revenue Service, for

the sole purpose of tolling the statute of limitations for the year 1956[1] (R. 1–2):

COMPLAINT FOR VIOLATION OF SECTION 7201 INTERNAL REVENUE CODE OF 1954—FILED APRIL 15, 1963

Before Lee E. Cisel, United States Commissioner, Western District of Missouri.

The undersigned complainant, being duly sworn, states:

That he is a Special Agent of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of Max Jaben for the calendar year 1956, by examining the said taxpayer's tax return for the year 1956 and other years; by identifying and interviewing third parties with whom the said taxpayer did business; by consulting public and private records reflecting the said taxpayer's income; and by interviewing third persons having knowledge of the said taxpayer's financial condition.

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the 16th day of April, 1957, at Kansas City, Missouri, in the Western District of Missouri, Max Jaben did unlawfully and willfully attempt to evade and defeat the income taxes due and owing by him to the United States of America for the calendar year 1956, by filing and causing to be filed with the District Director of Internal Revenue for the District of Kansas City, Missouri, at Kansas City,

[1] See Section 6531 of the Internal Revenue Code of 1954, p. 2 above.

Missouri, a false and fraudulent income tax return, wherein he stated that his taxable income for the calendar year 1956 was $17,665.31, and that the amount of tax due and owing thereon was the sum of $6,017.32, when in fact his taxable income for the said calendar year was the sum of $40,001.76 upon which said taxable income he owed to the United States of America an income tax of $14,562.99.

DAVID A. THOMPSON,
Special Agent, Internal Revenue Service,
Kansas City, Missouri.

Sworn to before me and subscribed in my presence, this 15th day of April, 1963.

LEE E. CISEL,
United States Commissioner.

[SEAL]

The Commissioner determined from the complaint that there was probable cause to believe that petitioner had committed the offense charged, and thereupon issued a summons directing petitioner to appear before him at a preliminary hearing on May 15, 1963, to answer to the complaint (R. 2–3, 7–8). On May 11, 1963, the preliminary hearing on the complaint was continued to May 22, 1963, at the request of the United States Attorney and without objection by petitioner (R. 12, 13). The preliminary hearing was never held since, on May 17, 1963, the grand jury returned a three-count indictment charging petitioner with willfully attempting to evade his taxes for the years 1956, 1957, and 1958, in violation of Sections 7201 and 7206(1) of the Internal Revenue Code of 1954 (R. 3–5).

On May 24, 1963, petitioner entered a plea of not

guilty to all counts of the indictment. Thereafter, on July 2, 1963, he filed a motion to dismiss count one, pertaining to the year 1956, on the ground that the complaint did not show probable cause to believe that he had violated Section 7201 and hence was insufficient to toll the statute of limitations for that year (R. 40–41, 57). On August 6, 1963, at a hearing on this motion, Commissioner Cisel testified that he issued the summons solely on the basis of the sworn complaint submitted by the special agent. Defense counsel then called special agent Thompson as a witness. At the inception of the direct examination, government counsel objected to any interrogation of the agent with respect to the issue of probable cause on the ground that that question "must be determined from the complaint itself" (R. 18). After a brief colloquy, the court at first reserved decision on the government's objection (R. 19), but later during the hearing ruled that the only question "is whether or not the Commissioner was justified at the time the information was taken before him in issuing and signing the summons" (R. 24).[2]

On September 4, 1963, the court denied petitioner's motion, and held that the complaint was sufficient

[2] Defense counsel was permitted to question special agent Thompson as to some aspects of his examination (R. 18–27). The agent testified that his investigation of petitioner's tax liability commenced in April 1961 and continued until January 1963 (R. 25–26); that the "private records" which he examined consisted of the records of various partnerships which were reflected in petitioner's return, including the Baltimore Avenue Association, the Holmes Hotel, Main Street Investment Company, 1122 Penn Building Company, and the Midwest Exchange (R. 20–21); and that it took him a long time to write his report (R. 25–27).

to toll the statute of limitations (R. 41–42, 44). Thereafter, on November 1, 1963, petitioner renewed his motion to dismiss count one of the indictment (R. 44) on the ground that the Ninth Circuit, in *United States* v. *Greenberg*, 320 F. 2d 467, had held a virtually identical complaint to be insufficient to toll the statute. On November 8, 1963, the district court, declining to follow the *Greenberg* opinion, again denied petitioner's motion (R. 47–48). On November 26, 1963, the Eighth Circuit denied a petition for a writ of prohibition and/or mandamus to review the holding of the district court. *Jaben* v. *Duncan*, 324 F. 2d 956.

On December 2, 1963, the date set for trial, petitioner withdrew his plea of not guilty to count one of the indictment, and entered a plea of *nolo contendere* which was accepted by the court (R. 49–51). Counts two and three of the indictment were thereafter dismissed at the request of the government, and, on January 7, 1964, petitioner was sentenced to imprisonment for a period of two years (R. 52–53). Execution of all but four months of the sentence was suspended, and petitioner was placed on probation for twenty months (R. 53).

The court of appeals affirmed the conviction (R. 55–62). Rejecting the view expressed in *United States* v. *Greenberg*, it held that the complaint satisfied the Fourth Amendment standard of probable cause as applied in *Giordenello* v. *United States*, 357 U.S. 480, since (R. 61):

> * * * the complainant (Agent Thompson) stated under oath that he had personally investigated the tax liability of appellant; he set forth the

nature of that investigation and stated that based upon the investigation he had "personal knowledge" that appellant had committed the offense which formed the basis of Count I of the indictment. In our view, the complaint does "pass muster" because it does provide a basis for the Commissioner's determination of the existence of probable cause.

ARGUMENT

Introduction and Summary

Section 6531 of the Internal Revenue Code of 1954 establishes a six-year period of limitations for the offense of willfully attempting in any manner to evade or defeat any tax. It further provides that "[w]here a complaint is instituted before a commissioner of the United States within the period above limited," the period shall be extended for "9 months after the date of the making of the complaint before the commissioner." The complaint in the instant case, charging attempted evasion of taxes for 1956, was filed within the six-year statutory period. The indictment was returned within nine months from the filing of the complaint. The sole question presented is whether the complaint was effective for the purpose of tolling the statute of limitations.

The complaint alleged that the affiant was a special agent of the Internal Revenue Service; that he had personal knowledge that petitioner had evaded specific amounts of taxable income and taxes; and that he had obtained this information from public and private records and from persons who knew petitioner's financial condition and had business dealings with

him. Moreover, the Commissioner could properly consider that complaints of this kind are not initiated by a single agent but are reviewed at higher levels of the Internal Revenue Service and in the Department of Justice. This Court has held that in the case of a search pursuant to a warrant, it need only appear that the magistrate had "substantial basis" for ruling that there was probable cause. *Jones* v. *United States,* 362 U.S. 257, 270–271; *Aguilar* v. *Texas,* 378 U.S. 108, 110–111. In light of the allegations and the relevant procedures, we believe that the complaint provided substantial basis for the Commissioner's finding of probable cause even if the Fourth Amendment's standard of probable cause is applied.

Moreover, here there was no invasion of privacy whatever. Petitioner was neither arrested nor searched. The sole purpose of the complaint was to toll the statute of limitations. Thus, in our view, the Fourth Amendment is in no way involved.

The proper standard must be determined by looking to Section 6531 and the Federal Rules of Criminal Procedure. Section 6531 provides that the period of limitations is tolled upon institution by the government of a complaint. The requirements for a complaint are set forth in Rule 3, which says only that the complaint must state "the essential facts constituting the offense charged" and that it "be made upon oath." While Rule 4(a) requires a showing of probable cause for the Commissioner to issue an arrest warrant (or, arguably, a summons), there is no such requirement for a complaint having the entirely discrete purpose of tolling a statute of limita-

tions. Since the basic right of privacy is not involved, the only interest petitioner can claim is that of not having the time extended merely at the whim of the government. We believe that this interest is protected if, as here, the complaint states the essential elements of the offense under oath. In fact, the complaint here shows that the government had conducted a thorough investigation and had specific information indicating that petitioner had evaded taxes.

THE COMPLAINT FILED BY THE SPECIAL AGENT WAS SUFFICIENT TO EXTEND THE STATUTE OF LIMITATIONS UNDER SECTION 6531 OF THE INTERNAL REVENUE CODE

A. A COMPLAINT WHICH STATES THE ESSENTIAL FACTS CONSTITUTING A TAX OFFENSE UPON A CAREFUL INVESTIGATION BY THE AGENT MAKING THE COMPLAINT SATISFIES SECTION 6531, WHETHER OR NOT IT SHOWS "PROBABLE CAUSE" FOR AN ARREST OR SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT

Section 6531 provides in part:

> Where a complaint is instituted before a commissioner of the United States within the period above limited [*i.e.*, 6 years], the time shall be extended until the date which is 9 months after the date of the making of the complaint before the Commissioner of the United States.

The complaint to which this section refers is obviously the complaint defined in Rule 3 of the Rules of Criminal Procedure:

> The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

The complaint filed by the special agent in the present case is a sufficient complaint within the meaning of Rule 3. It charges an offense, sets forth the basis of the accusation, and is sworn to by the agent. It states that the agent had conducted an investigation of petitioner's income tax liability for 1956 by examining petitioner's tax returns for that and other years; by interviewing third parties with whom petitioner did business or who had knowledge of his financial condition; and by consulting public and private records reflecting petitioner's income (R. 1). The complaint further states that, based on this investigation, the agent had personal knowledge that petitioner had filed a fraudulent tax return for 1956 by declaring that his taxable income for that year was $17,665.31 and the tax due was $6,017.32, when in fact his taxable income was $40,001.76 and the tax due was $14,562.99 (R. 1–2).[3] In sum, the complaint shows under oath, that the agent has personal knowledge, based on an extensive investigation, which permitted a statement in specific figures as to petitioner's actual tax liability.

In determining whether Congress required more, it is proper to take into account the familiar, well-established procedures followed before filing complaints in income tax cases. Investigation of frauds on the revenue are conducted by special agents of the Internal Revenue Service who have had training in either accounting or law. Within the Internal Revenue Serv-

[3] The indictment which was later returned, charging petitioner with willfully attempting to evade taxes for 1956, gave the same figures as to the taxpayer's true income and tax sworn to by the agent in his complaint (R. 3–4).

ice, the findings and recommendations of the special agent making the investigation are reviewed successively by his Group Chief, the Chief of the Intelligence Division in the District Director's Office, the Office of the Assistant Regional Commissioner-Intelligence, and, finally, by the Enforcement Division in the Office of Regional Counsel. If the ultimate recommendation of the Internal Revenue Service, acting through the Regional Counsel, is that the case should be prosecuted, the entire file is then sent to the Department of Justice, where the case is again thoroughly reviewed—by an attorney in the Criminal Section of the Tax Division, by the Chief of the Criminal Section, and, on occasion, by the Assistant Attorney General in charge of the Tax Division. At several steps in this review procedure, both in the Internal Revenue Service and in the Department of Justice, a taxpayer, if he wishes, is normally afforded a conference so that he may present any explanation, facts, or evidence which he desires to have considered. It is only after this lengthy review is completed that the case is referred for prosecution to the United States Attorney, to whom taxpayers often again present their explanations in a final effort to dissuade prosecution. Balter, *Tax Fraud and Evasion,* 3.13–3.31 (3d ed., 1963); see *Sullivan* v. *United States,* 348 U.S. 170.

The decision to file a complaint is not made by the special agent, but by the Tax Division of the Department of Justice. It is only after receiving express instructions from the Justice Department that the special agent files the complaint. Thus, unlike the situation presented by the usual criminal case, the

complaint in an income tax case represents the outcome of an elaborate investigating and review procedure.

Significantly, Section 6531 provides that the mere filing of "a complaint" extends the statute of limitations. There is no reference to "probable cause," no reference to a determination by the Commissioner or the issuance of a warrant or summons.[4] All that is required is "a complaint." *United States* v. *Clark*, 122 F. Supp. 150, 151 (N.D. Ala.).

To be sure, for some purposes a complaint is insufficient unless it makes a showing of "probable cause" consistent with the requirements of the Fourth Amendment. Rule 4(a) authorizes the issuance of a warrant for the arrest of the defendant "if it appears from the complaint that there is probable cause to believe" that the defendant has committed an offense. The "probable cause" there required is indubitably the same showing that must be made to justify a warrant or search and seizure under the Fourth Amendment. *Giordenello* v. *United States*, 357 U.S. 480, 485; *Aguilar* v. *Texas*, 378 U.S. 108, 112, note 3. But the requirements of the Fourth Amendment should not be read into Rule 3 for all purposes and certainly should not be carried over into the bare requirement of a complaint filed solely for the purpose of tolling the statute of limitations under Section 6531. Complaints serve different functions. One

[4] Of course, there must be some notice of the complaint, formal or informal, to the defendant—a requirement clearly met in this case. In cases such as *United States* v. *Rully*, 136 F. Supp. 881 (D. Conn.), and *United States* v. *Montgomery*, 158 F. Supp. 267 (E.D. Pa.), the complaint was found invalid because the defendant had not been properly notified.

is to give the defendant notice of the charge against him and to bring the matter within the jurisdiction of the court. A complaint may be sufficient for this purpose even though it would not justify the issuance of a warrant because it failed to set forth probable cause within the meaning of the Fourth Amendment. *Byrnes* v. *United States*, 327 F. 2d 825 (C.A. 9), certiorari denied, 377 U.S. 970. Another purpose is the issuance of a summons. Whether the showing that must be made to justify the issuance of a summons requiring the defendant merely to respond and setting the stage for a hearing before the Commissioner is the same as would be required for an arrest warrant need not be determined in the present case. Still another purpose of a complaint—that which is relevant here—is the tolling of the statute of limitations. Whether a complaint is sufficient to issue a warrant, to issue a summons, or to toll the statute of limitations must be determined with reference to the particular function it performs and not by the ritualistic application of formulas.

A complaint tolling the statute of limitations serves an altogether different function than one laying the foundation for an arrest; its consequences and the procedure underlying it are altogether different. Unlike the police officer, who often must act quickly to seize the fruits of the crime, the special agent in an income tax case conducts an exhaustive investigation; the crime of tax evasion, if it has taken place, has long since occurred. And, unlike the police officer, who necessarily must operate with little supervision in the "often competitive enterprise of

ferreting out crime" (*Johnson* v. *United States*, 333 U.S. 10, 14), the special agent's findings and recommendations must, as we have seen, pass through several levels of review in the Internal Revenue Service and the Department of Justice before referral to the United States Attorney for prosecution.

As a result, the special agent's investigation of a complicated tax evasion case, together with the review procedure which later follows, is a lengthy and time-consuming process. The process is particularly lengthy where, as here (R. 42), "the Government rests its case solely on the approximations and circumstantial inferences of a net worth computation, [since] the cogency of its proof depends upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt." *Holland* v. *United States*, 348 U.S. 121, 135.

Although the government has six years within which to return an indictment for tax evasion, occasionally this period proves insufficient, albeit the government has gathered considerable evidence of tax errors. Extra time may be required because a grand jury is not in session in the judicial district; because there is a need for further investigation of such matters as the taxpayer's explanation; or because the taxpayer wishes an opportunity to discuss his contentions with either the Department of Justice or the United States Attorney. In these infrequent situations,[5] the government invokes the complaint procedure provided by Congress in Section 6331 of the Code.

[5] Of the 803 criminal income tax cases now pending, only 23 were instituted in whole or in part by complaint in order to extend the statute of limitations.

The effect of the complaint is only to charge a crime, to give the defendant notice, and to toll the statute of limitations. Except where there is a risk that the taxpayer will flee the jurisdiction, the government has no interest in causing his arrest. If it sought an arrest, probable cause would have to be shown; but petitioner was never arrested. His home was not searched. And there was no seizure of his property. It is true that the complaint sought the issuance of a summons and a summons was issued. However, petitioner was never required to respond to it. In any event, it is immaterial whether the complaint was sufficient to justify the issuance of the summons. The sole question here is whether the complaint was sufficient to give petitioner notice of the crime with which he was charged and to toll the statute of limitations. Since the filing of the complaint did not possibly involve any invasion of petitioner's privacy, the answer must be that the Fourth Amendment does not apply.

Moreover, there is no reason for adopting the Fourth Amendment's standard of probable cause. The only interest petitioner can assert is that of not being charged with crime or having the statute of limitations extended for a few months at the mere whim of the government. This interest is adequately protected if

the complaint shows that, on the basis of a full investigation, the government has specific information that a person has evaded taxes.

Not only does the complaint procedure lack any element of invasion of privacy; it has a salutary purpose which would be impaired by subjecting complaints in tax evasion cases to the strict standards applied in cases arising under the Fourth Amendment. This Court has recognized that the difficulties in detecting tax evasion cases and in developing criminal tax cases—especially where, as here, the net worth method must be employed—create problems that "cannot be met merely by the application of general rules." *Holland* v. *United States, supra,* 348 U.S. at 129. Indeed, the Congressional recognition of the circumstances peculiar to an evasion case is reflected in the extraordinary complaint procedure provided in Section 6531 of the Internal Revenue Code—to our knowledge, the only such provision which exists in the federal law. An unduly restrictive attitude in interpreting such complaints would tend to defeat the objectives of the complaint procedure—"the dual purpose of affording all parties further opportunity for conferences and reviews, perhaps even at the level of the United States Attorney, while protecting the Government from the lapse of time to prosecute, if that be the ultimate decision." Balter, *supra,* 12.8. Moreover, the complaint procedure allows the taxpayer, if he has not yet presented his views either in a mem-

orandum or at a conference, an opportunity to do so before indictment.[6]

Granting that the government could set forth in the complaint further details of its investigation, we submit that such pleading would be inappropriate in the great majority of criminal tax cases. Where, as in most instances, hundreds of records have been examined and scores of witnesses questioned, it is impractical to draft a complaint detailing the records examined, the witnesses interviewed, and the information thereby obtained. Apart from the administrative burden, the result would be to require a full bill of particulars before the case was even ready for the grand jury. And the Commissioner would still have to rely primarily upon the special agent's expert interpretation and evaluation of the complex information presented.

In distinguishing the cases defining "probable cause" for the purposes of the Fourth Amendment, we do not suggest that the period of limitations should be extended by the filing of any piece of paper denominated a complaint. There must be a written statement of the essential facts constituting the offense charged, within the meaning of Rule 3. It must be made upon oath and therefore must be the consequence of conscientious investigation. There would seem to be no occasion for reading the words "probable cause" into Rule 3 and Section 6531 for those words are better used as a term of art applicable to arrests or

[6] A taxpayer in an evasion case is often a person of otherwise good reputation whose paramount interest is in preventing an indictment and the accompanying notoriety.

searches and seizures under the Fourth Amendment. We suggest further that even if the term "probable cause" were read into Rule 3 and Section 6531, the result should be the same. The character of the showing required to constitute "probable cause" will vary with the purpose for which the showing is made, and what is sufficient to justify a formal charge having only the consequence of extending the statute is less than what is required to justify the invasions of liberty and privacy attendant upon arrest or search and seizure.

In short, we believe that the Fourth Amendment is not applicable and that the Court should not adopt its standards in this discrete situation. The interest of the taxpayer is fully protected by requiring that the government file a sworn complaint, stating the essential facts which make out the offense. Here, the complaint amply met this requirement since, on the basis of full investigation and repeated review, it alleged the exact tax which had been evaded. To demand more would neither protect the taxpayer's rights of privacy nor any other significant interest. It would merely impose an unnecessary burden without any compensating gain.

B. IN ANY EVENT, THE COMPLAINT HERE SATISFIED THE STANDARD OF PROBABLE CAUSE OF THE FOURTH AMENDMENT

Even if we assume, *arguendo*, that the standard of the Fourth Amendment is applicable, the complaint in this case was sufficient to make out probable cause.

This Court has often enunciated the legal standards for determining the existence of probable cause under

the Fourth Amendment. This basic standard is whether "the facts and circumstances within [the police officer's or Commissioner's] knowledge * * * were sufficient in themselves to warrant a man of reasonable caution in the belief" that the suspect has committed a crime. *E.g., Carroll* v. *United States,* 267 U.S. 132, 162; *Brinegar* v. *United States,* 338 U.S. 160, 175–176. Technical proof of guilt is not required, for the test deals with probabilities and with the practical considerations of everyday life which prompt reasonable men to action. *Id.* at 175. The quantum of information that constitutes probable cause must ultimately be measured by the facts and circumstances of the particular case. *Wong Sun* v. *United States,* 371 U.S. 471, 479; *Carroll* v. *United States,* 267 U.S. 132, 162.

Several recent decisions of this Court have shed considerable light on the application of these general principles to complaints which sought the issuance of arrest or search warrants. In *Giordenello* v. *United States,* 357 U.S. 480, 484, a narcotics case, the Court held that a complaint was defective where "it in effect recited no more than the elements of the crime charged * * *."[7] The Court stated the core of its decision as follows (*id.* at 486):

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[7] The complaint in *Giordenello* read in part (357 U.S. at 481):

> The undersigned complainant [Finley] being duly sworn states: That on or about January 26, 1956, at Houston, Texas in the Southern District of Texas, Veto Giordenello did receive, conceal, etc., narcotic drugs, to-wit:

The protection afforded by [Rules 3 and 4 of the Federal Rules of Criminal Procedure], when they are viewed against their constitutional background, is that the inferences from the facts which lead to the complaint "* * * be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson* v. *United States,* 333 U.S. 10, 14. The purpose of the complaint, then, is to enable the appropriate magistrate, here a Commissioner, to determine whether the "probable cause" required to support a warrant exists. The Commissioner must judge for himself the persuasiveness of the facts relied on by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion that the person whose arrest is sought has committed a crime.

When the complaint in this case is judged with these considerations in mind, it is clear that it does not pass muster because it does not provide any basis for the Commissioner's determination under Rule 4 that probable cause existed. The complaint contains no affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein; it does not indicate any sources for the complainant's belief; and it does not set forth any other sufficient basis upon which a finding of probable cause could be made.

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heroin hydrochloride with knowledge of unlawful importation; in violation of Section 174, Title 21, United States Code.

And the complainant further states that he believes that ---------- ---------- are material witnesses in relation to this charge.

In *Giordenello,* the Court found it unnecessary to decide whether a warrant might be issued solely on the basis of hearsay information contained in the complaint. 357 U.S. at 485. The following year, in *Draper* v. *United States,* 358 U.S. 307, the Court held that a warrantless arrest could be made on the basis of hearsay testimony, obtained from an informant whose reliability had been previously determined, although it was corroborated only by the officer's personal observation that the subject resembled the description given him by the informant. Thereafter, in *Jones* v. *United States,* 362 U.S. 257, 269, the Court held that it followed, *a fortiori,* from *Draper* that a search warrant may be issued upon a showing of probable cause based on hearsay so long as there was "a substantial basis for crediting the hearsay." The Court reasoned that the rule cannot be more strict for arrests made with a warrant than without one since otherwise resort to the use of warrants would be discouraged. "In a doubtful case, when the officer does not have clearly convincing evidence of the immediate need to search, it is most important that resort be had to a warrant, so that the evidence in the possession of the police may be weighed by an independent judicial officer, whose decision, not that of the police, may govern whether liberty or privacy is to be invaded." *Id.* at 270–271. The Court upheld the search even though the "Commissioner need not have been convinced of the presence of narcotics in the apartment. He might have found the affidavit insufficient and withheld his warrant. But there was substantial basis for him to conclude

that narcotics were probably present in the apartment, and that is sufficient." *Id.* at 271. See also *Rugendorf* v. *United States,* 376 U.S. 528, 533 (complaint disclosed "substantial basis" for the Commissioner's issuance of a search warrant).

Subsequently, in *Aguilar* v. *Texas,* 378 U.S. 108, 110–111, this Court upheld a search warrant on the ground that the standard for testing the validity of a search warrant is less strict than for considering a search incident to an arrest:

> An evaluation of the constitutionality of a search warrant should begin with the rule that "the informed and deliberate determinations of magistrates empowered to issue warrants * * * are to be preferred over the hurried action of officers * * * who may happen to make arrests." *United States* v. *Lefkowitz,* 285 U.S. 452, 464. * * * Thus, when a search is based upon a magistrate's, rather than a police officer's, determination of probable cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant" * * * and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present * * *."[8]

The decisions in *Giordenello, Jones, Rugendorf,* and *Aguilar* make clear then that, whether a complaint

[8] The warrant was held invalid because the only allegation in the complaint was that "[a]ffiants have received reliable information from a credible person and do believe that" the suspect was secreting narcotics in his apartment.

is based on personal knowledge or reliable hearsay, it need only set forth a substantial basis upon which a finding of probable cause can be made. It is not appropriate for a reviewing court, after the warrant has been issued, to determine whether an unfavorable interpretation of the complaint is available; it is sufficient, as held in *Jones,* if the language of the complaint reasonably supports the finding of probable cause which the Commissioner made. Accord: *Irby* v. *United States,* 314 F. 2d 251, 253 (C.A. D.C.), certiorari denied, 374 U.S. 842; *United States* v. *Nicholson,* 303 F. 2d 330, 332 (C.A. 6), certiorari denied, 371 U.S. 823; *United States* v. *Ramirez,* 279 F. 2d 712, 716 (C.A. 2).

The complaint here set forth substantial basis for the finding of probable cause. The affiant, a special agent of the Internal Revenue Service, swore that he had personal knowledge that petitioner had evaded specific amounts of income and taxes and that he had obtained this information from public and private records and from other persons. Moreover, these conclusions, under the Service's usual procedures, had been reviewed at several levels by the Service and by the Tax Division of the Department of Justice, which made the ultimate decision to file the complaint.

Several courts have considered the validity of a complaint with allegations similar to those in the complaint here[9] on the assumption that Fourth Amendment standards were applicable. With the isolated exception of *United States* v. *Greenberg,* 320 F. 2d

[9] As discussed below (pp. 29–31), complaints in income tax cases follow a form provided by the Service.

467 (C.A. 9), every court which has considered the matter, including each of the courts below, has upheld the complaint. *Sanseverino* v. *United States,* 321 F. 2d 714, 715 (C.A. 10); *United States* v. *Black,* 216 F. Supp. 645 (W.D. Mo.); *United States* v. *Scheetz,* 224 F. Supp. 789 (S.D. Ind.).

Petitioner argues (Br. 14) that the complaint is defective because the allegation of a fraudulent understatement of income is based not on "personal knowledge," but on testimonial and documentary hearsay derived from third parties and said to lack the specificity which would entitle it to credit. However, part of the information sworn to by the agent comes from public and private records (R. 1) and has greater claim to reliability than information supplied, for example, by a narcotics informant. *Smith* v. *United States,* 321 F. 2d 427, 430 (C.A. 9). Moreover, as noted above, the specific figures regarding taxpayer's correct income and tax show that the agent obtained specific information. These considerations are sufficient to establish substantial basis for crediting the agent's information and finding probable cause.

Petitioner's argument is particularly unsound in a net worth case. In most criminal cases—for example, a crime of violence or a sale of narcotics—there is an act which is palpably criminal. Consequently, the complaint may be based on the say-so of eyewitnesses, either directly or through reliable hearsay. However, "in a crime such as tax evasion there is no tangible injury which can be isolated as a *corpus delicti*" (*Smith* v. *United States,* 348 U.S. 147, 154); the financial affairs involved in tax evasion cases are

not themselves ordinarily criminal; it is the concealment of the results of profitable ventures, not necessarily or ordinarily illegal *per se*, which gives rise to the crime.

Where the taxpayer attempts to conceal or cover up the sources of his income, the government, as in this case (R. 42), seeks to establish the fraudulent tax deficiencies by the net worth method of proof. The nature of a net worth case was succinctly described by the Court in *Holland* v. *United States, supra*, 348 U.S. at 125:

> In a typical net worth prosecution, the Government, having concluded that the taxpayer's records are inadequate as a basis for determining income tax liability, attempts to establish an "opening net worth" or total net value of the taxpayer's assets at the beginning of a given year. It then proves increases in the taxpayer's net worth for each succeeding year during the period under examination and calculates the difference between the adjusted net values of the taxpayer's assets at the beginning and end of each of the years involved. The taxpayer's non-deductible expenditures, including living expenses, are added to these increases, and if the resulting figure for any year is substantially greater than the taxable income reported by the taxpayer for that year, the Government claims the excess represents unreported taxable income. In addition, it asks the jury to infer willfulness from this understatement, when taken in connection with direct evidence of "conduct, the likely effect of which would be to mislead or to conceal." *Spies* v. *United States*, 317 U.S. 492, 499.

In light of the nature of a net worth prosecution, it is clear that the kind of investigation described in the present complaint provides a practicable and ample basis for an ultimate conclusion of fraudulent understatement of income. Obviously, as stated in the complaint (R. 1), the special agent must first examine the items of income reported in the taxpayer's return [10] and compare them with the income reflected in the taxpayer's "private" books and records [11] in order to determine whether a tax deficiency exists. If the books and records are unavailable for examination, are shown to be inaccurate, or, even if reconcilable with the returns, are nevertheless suspect for other reasons, the special agent then commences a full net worth investigation to establish the taxpayer's assets, liabilities, and non-deductible personal expenditures for the years involved. Necessarily, such an investigation requires the special agent to examine the records of third parties (such as banks, stock brokers, etc.),[12] and to interview third parties "with whom the said taxpayer did business" or who had "knowledge of said taxpayer's financial con-

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[10] Tax returns are specifically made public records under Section 6103 of the 1954 Internal Revenue Code and hence are excepted from the hearsay rule. In addition, matters revealed in a tax return fall within the "admissions" exception to the hearsay rule (28 U.S.C. 1732(a)).

[11] Information contained in a taxpayer's books (such as the partnership records examined by the special agent in this case (R. 21)) are excepted from the hearsay rule as either "admissions" or under the exception for business records (28 U.S.C. 1732(a)).

[12] Such records are also admissible as exceptions to the hearsay rule under 28 U.S.C. 1732(a). See note 11 above.

dition"[13] (see R. 1). It is also essential to an accurate net worth statement that the special agent examine various "public records * * * reflecting the said taxpayer's income" (see R. 1) as, for example, records showing land holdings in the county registry of deeds, motor vehicle registrations, and the like."[14]

It is only after a thorough investigation of this nature that the special agent gains the "personal knowledge" of the offense to which he swears in the complaint (R. 1). The individual pieces may be without crucial significance but the whole forms "a picture meaningful to a trained, experienced observer." *Christensen* v. *United States*, 259 F. 2d 192, 193 (C.A. D.C.). See also *Steele* v. *United States, No. 1*, 267 U.S. 498, 504–505. Upon the basis of the facts gained in such an investigation, the special agent can then apply his accounting expertise and his knowledge of the revenue laws in making his final allegations that the taxpayer filed a fraudulent return, stating with particularity his estimate of the amount of taxable income and the amount of tax evaded by the taxpayer (R. 1–2). In short, because of the unique nature of the crime of tax evasion, no more should be required in a complaint sworn to by a special agent than a statement of the basic findings drawn from his investigation of various sources, including information gained and reported from third parties.

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[13] Information acquired by interviewing third parties is admittedly hearsay.

[14] Federal and State records, if properly authenticated, are excepted from the hearsay rule. 28 U.S.C. 1733(a), (b); 28 U.S.C. 1738, 1739.

Petitioner also claims (Br. 15–20) that the present complaint fails to meet the requirements of the Fourth Amendment since it is merely a "form" complaint which the government uses throughout the country in order to toll the statute of limitations in tax evasion cases. It is true, as petitioner states, that a form of complaint is disseminated by the Department of Justice to serve as a guide to United States Attorneys, who frequently counsel the special agent in the mechanics of preparing and filing the complaint.[15] Petitioner fails to note, however, that the investigative steps enumerated in the complaint are bracketed on the following express instructions (see the Appendix, p. 33 below):

> The bracketed descriptions of the kinds of investigation conducted by the subscribing Agent may all be used if they correctly reflect the facts. Otherwise, the inapposite description should, of course, be deleted. When appropriate, the description of a different investigative course should be added or substituted based on the facts.

It is clear from the complaint itself that the special agent in the case did not slavishly copy the form; he deleted one of the bracketed phrases. Cf. R. 1 with

[15] The suggested form of complaint used by the Government, which is set forth in the Appendix, pp. 32–33 below, was drawn up by the Department of Justice in order to meet the requirements of the *Giordenello* decision. Cf. *United States* v. *Langsdale*, 115 F. Supp. 489 (W.D. Mo.) (pre-*Giordenello*), and *United States* v. *DeHardit*, 120 F. Supp. 110 (E.D. Va.), affirmed, 224 F. 2d 673 (C.A. 4), certiorari denied, 350 U.S. 863 (pre-*Giordenello*); with *United States* v. *Freeman*, 165 F. Supp. 121 (S.D. Ind.) (post-*Giordenello*).

the Appendix, p. 32 below. Moreover, the record confirms the fact that the agent made a lengthy investigation before expressing his conclusions in the complaint (see p. 6, note 2 above).[16]

Petitioner suggests (Br. 18) that the purpose of the complaint procedure—to supply the Commissioner with sufficient facts upon which to make a determination of probable cause—is somehow defeated by "a form which is so universal in its application that it is literally true even when viewed in the light of the myriad probabilities of tax evasion." However, as already observed, the offense of tax evasion, unlike the offenses charged in the typical criminal case is subject to a regularized pattern of investigation; standard techniques are normally utilized when the government seeks to establish tax deficiencies by the net worth method of proof. See, *e.g.*, *Holland* v. *United States*, *supra*; *Friedberg* v. *United States*, 348 U.S. 142; *Smith* v. *United States*, 348 U.S. 147; *United States* v. *Calderon*, 348 U.S. 160.[17] In such circumstances, the government's use

[16] Petitioner's allegation (Br. 19) that the testimony of the special agent in the district court indicated "that he did not even understand let alone prepare the affidavit" has no support in the record. The record reference cited by petitioner (R. 20) wholly fails to support [illegible] claim, and the agent's comprehension of the subject matter was clear from his testimony.

[17] Similar patterns of investigation, frequently no less complex, are also applicable where the government seeks to establish a fraudulent understatement of income under the "specific items" or "bank deposits" theory of proof. See, *e.g.*, *Swallow* v. *United States*, 307 F. 2d 81 (C.A. 10), certiorari denied, 371 U.S. 950; *United States* v. *Durant*, 324 F. 2d 859 (C.A. 7), certiorari denied, 377 U.S. 906; *Gleckman* v. *United States*, 80 F. 2d 394 (C.A. 8), certiorari denied, 297 U.S. 709.

of a form is perfectly appropriate as a guide to Internal Revenue Agents.

Indeed, the use of a form is, for present purposes, irrelevant. If the sworn allegations meet the test of probable cause, the complaint is valid whether or not it is based on a suggested form. As we have seen above, the complaint here satisfies the standard of the Fourth Amendment and, *a fortiori,* the less demanding standard which we believe is properly applicable.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

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JANUARY 1965.

APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE ---------- DISTRICT OF ----------

UNITED STATES OF AMERICA
against

Complaint

Complaint for Violation of Section 7201 Internal Revenue Code of 1954*

Before ---------, United States Commissioner ------, ----------.

The undersigned complainant, being duly sworn, states:

That he is a Special Agent [or Revenue Agent] of the Internal Revenue Service and, in the performance of the duties imposed on him by law, he has conducted an investigation of the Federal income tax liability of ---------- for the calendar year 19--, by examining the said taxpayer's tax return for the year 19-- and other years; [by examination and audit of the said taxpayer's business and financial books and records;] [by identifying and interviewing third parties with whom the said taxpayer did business;] [by consulting public and private records reflecting the said taxpayer's income;] [and by interviewing third persons having knowledge of the said taxpayer's financial condition].

That based on the aforesaid investigation, the complainant has personal knowledge that on or about the ------ day of ---------, 19--, at ---------, ---------, in the ---------- District of ---------, did unlawfully and wilfully attempt to evade and defeat the income taxes due and owing by him to the United

States of America for the calendar year 19--, by filing and causing to be filed with the District Director of Internal Revenue for the Internal Revenue District of ----------, at ---------- a false and fraudulent income tax return, wherein he stated that his taxable [or adjusted gross] income for the calendar year 19-- was $----------, and that the amount of tax due and owing thereon was the sum of $----------, when in fact his taxable [or adjusted gross] income for the said calendar year was the sum of $---------- upon which said taxable [or adjusted gross] income he owed to the United States of America an income tax of $----------.

Title of Subscribing Internal Revenue Service Officer

Sworn to before me and subscribed in my presence, this ---------- day of ----------; 19--.

United States Commissioner

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*The bracketed descriptions of the kinds of investigation conducted by the subscribing Agent may all be used if they correctly reflect the facts. Otherwise, the inapposite description should, of course, be deleted. When appropriate, the description of a different investigative course should be added or substituted based on the facts.

When drafting complaints for violation of other Sections of the Internal Revenue Code, refer to the appropriate indictment form as a guide.

[Complaint for tolling statute of limitations under provisions of Section 6531, Internal Revenue Code of 1954. To be sworn to by Internal Revenue Service Officer having knowledge of facts].

Form No. 1

U.S. GOVERNMENT PRINTING OFFICE: 1965